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preme Court of the United States

OCTOBER TERM, 1944

NO. 1237.

TIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

IEF FOR RESPONDENT JONES & LAUGHLIN STEEL CORPORATION, OPPOSING PETITION FOR CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1237.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

BRIEF FOR RESPONDENT JONES & LAUGHLIN STEEL CORPORATION, OPPOSING PETITION FOR CERTIORARI.

Opinions of the Circuit Court and the Board.

In *re Jones & Laughlin Steel Corporation, etc.*, 49 N.L.R.B. 390 (May 3, 1943: printed also at R. 71), the petitioner, National Labor Relations Board, held that the force of fifty-six (R. 44) armed guards or policemen in respondent's Otis Works—its steel plants in Cleveland, Ohio—constituted an appropriate unit for the purposes of collective bargaining, and directed an election by secret ballot to determine whether or not they desired to be represented for those purposes by the United Steelworkers of America, a C.I.O. labor union.

In *re Jones & Laughlin Steel Corporation, etc.*, 53 N.L.R.B. 1046 (December 2, 1943), the Board reported

its final Decision and Order in the case (R. 99) and also the Intermediate Report of its Trial Examiner issued October 5, 1943 (R. 84), both of which affirmed the validity of the election order just described; held respondent's refusal to recognize the union as representative of the plant police an unfair labor practice, in violation of Section 8 (5) of the National Labor Relations Act; and ordered respondent to grant the union full recognition.

In *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 146 Fed. (2d) 718 (December 8, 1944), the Sixth Circuit Court of Appeals denied the Board's petition for enforcement of its said final Order and Decision of December 2, 1943, holding that respondent should not, under the Act, be required to recognize the Union as representative of the plant police.

Jurisdiction of This Court.

Under Section 10 (e) of the National Labor Relations Act (29 U.S.C. 160 (e)), this Court has jurisdiction to grant or deny a review of the decision of the Circuit Court of Appeals upon Writ of Certiorari, in the manner provided by Section 240 of the Judicial Code as amended (28 U.S.C. 347). The petition for certiorari in this case was timely—it was filed on May 5, 1945, less than three months after February 6, 1945, when the Board's Petition for Rehearing had been denied by the Circuit Court (R. 155).

Counter-Statement of the Case.

Petitioner's Statement is believed subject to criticism, because it tends to confuse the facts of this case with those of the cases of the *Federal Motor Truck*

Company and *E. C. Atkins and Company;* and because, possibly as a result, it almost wholly misstates the question of law which was presented to the Board and decided by the Court below in this case.

According to the petition for certiorari (pp. 12-13), the question presented to and decided by the Board, and later the Court below, related wholly to the status, under the National Labor Relations Act, of members of the Auxiliary Military Police force, created by the President's Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420). This may well have been true in the *Atkins* case—to judge by the opinion of the Seventh Circuit Court of Appeals, without reference to that record, but it was not true in this case. Here, the military status of the plant guards was of only incidental importance.

On December 2, 1942, the union which had been exclusive representative for several years of the 4,700 productive steel workers and other laborers at respondent's Otis Works in Cleveland, and of those similarly employed at several other plants also (R. 6-7), made a new contract as such (R. 7; 21; 17). This agreement drew the line between labor—the class of employees of which the union was to have jurisdiction, and management—the class which it did not claim to represent, by excluding from the scope of the contract "* * * Foremen or Assistant Foremen in charge of any class of labor, *watchmen,* salaried employes and nurses" (R. 21).

Shortly afterwards, at some time early in 1943, the union's Cleveland office undertook to "organize" the force of about sixty plant guards at the Otis Works (R. 19). On February 17, 1943, it demanded recognition by the Steel Company as their exclusive representative (R.

6); and, on March 15, 1943, after this demand had been refused by the Company, it filed with the Board the petition, under Section 9 (c) of the Act, which commenced this case (R. 1-2).

At the Board's hearing on this petition, held at Cleveland on April 8, 1943, the Company disputed the union's competency to be certified as exclusive representative of the plant guards, not because the guards had assumed their military status, but instead because the union already represented the 4,700 productive employees (R. 7-8); and because the work of the plant guards made them, as the union's agreement had classified them, part of management, and involved their assumption of essential duties and obligations which prohibited any division of their loyalty between the Company and the union—particularly in time of war (R. 8-9). Their military status was mentioned, but only as an incident of the company's main contentions (R. 9).

These contentions concerning the legal position of the plant police under the Act were, of course, rejected by the Board in its decision to hold the election (R. 71-73), and in its certification of the union as exclusive representative of all of the plant police after it had won the election (R. 47); but they were not modified or abandoned by the Company then or at any later stage of the case, and they remain to this day the grounds for its refusal to recognize the union.

The Company's contentions were renewed at the Board's second hearing of the case, held at Cleveland on September 28, 1943 (R. 49). The documentary evidence received at that hearing (R. 63) included a letter dated June 23, 1943 (R. 77) and a public statement of the

Company's position dated May 25, 1943 (R. 78-79), which reasserted the view that the plant police were an essential part or arm of management, who could not, under the Act, be placed within the jurisdiction of the union. *These documents made no reference to the military status of the police.* At the second hearing, in other words, the Company disputed the Board's conclusion that the police force—whether militarized or not—was an "appropriate unit" for the purposes of collective bargaining under the Act (R. 87).

When the Company filed its exceptions to the Trial Examiner's report, after the second hearing, it restated the same contentions again, and in considerable detail, treating the plant guards' military status only as an incidental matter (R. 93-95). This was its last opportunity to be heard, on this or any other point, before the Board. The Board's final decision (like the Intermediate Report) rejected the Company's views, without any allusion to the military status of the guard force (R. 99-100).

Although it is not shown by the record, it is true, as the Board says at page 27 of the petition for certiorari, that on May 29, 1944, or shortly thereafter, the plant police were "demilitarized" or discharged from the Auxiliary Military Police force. In considering this fact, however, it is important to observe that the Order by which the military authorities accomplished this provided expressly that:

> "* * * The demilitarization of your guard force does not in any way reduce the activities of your guard force, the duties of your demilitarized guard force remain precisely the same.
>
> * * * * * * *

"You may apply to local or state authorities for deputization of your guard force members, which deputization will give them essentially all of the powers which they enjoy as Auxiliary Military Police."[1].

When the case was argued in the Circuit Court, upon the Board's petition for enforcement of its final order-to-bargain, on October 16, 1944, almost three months after the "demilitarization," neither the Board nor the Company treated the military position of the plant police as a matter of any controlling importance.[2] As a result, the Court ignored the "demilitarization" (of which it had no knowledge) and—what is more significant here—its decision treated the assumed military status of the guards, not as a fact controlling their rights under

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1. This last suggestion was unnecessary. All regular members of the guard force at the Otis Works have, for years, been sworn, enrolled and commissioned as special patrolmen on the police force of the City of Cleveland.
2. In the Circuit Court, the Board's statement of the question presented was this:

"The sole issue presented by this case is whether the Board exceeded the bounds of its discretion in finding that respondent's plant-protection employees constitute an appropriate bargaining unit. * * * Respondent contends that this class of employees is not entitled to bargaining rights under the statute and that the Board's contrary finding is arbitrary and capricious. Respondent urges the following grounds in support of its position: (1) Plant-protection employees are not entitled to the benefits of the statute because they are supervisors and members of management and, hence not 'employees' within the meaning of the Act. (2) The policies of the

the Act, but instead as evidence of the public importance, in time of war, of the safety and protection of such steel plants as the Otis Works (R. 116). If the public need for the security of such plants had been sufficient to call for the establishment of military police to guard them, the Court reasoned, the independence and efficiency of such police must be deemed matters of great public importance; and their single-mindedness is, therefore, not to be jeopardized by their union organization, under orders of the Board and under an Act which was intended to infringe no consideration of public policy.

This proposition differs from that attributed to the Court at page 13 of the Petition for Certiorari, etc., in that the Board's hypothesis would make the decision depend wholly upon the military status of the plant police. That the Board's present view of the Circuit Court's decision is a wrong one will be shown, not only by a

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Act would be thwarted and defeated if bargaining rights were accorded these employees, for the conflict in loyalties attendant upon their obligations to respondent, to the United States Government, and to a labor organization would render genuine collective bargaining impossible."

And the Company's criticism of it, in its reply brief, was this:

"To the respondent, it appears that the question should be stated as follows:

" 'The sole issue presented by this case is whether the Board has exceeded the bounds of its discretion in determining that, to effectuate the purposes of the National Labor Relations Act, the respondent must be required to recognize a single industrial union as the representative of both the production and maintenance employees and of the plant guards and police in its Cleveland plants.' "

careful reading of the Court's opinion, but also by reference to the proceedings which followed that decision, in the Court below. In its Petition for Rehearing, filed January 8, 1945, the Board disclosed that the plant police had been "demilitarized" (R. 127). Had military status been the controlling fact in the case, in the view of the Court below, this petition would not have been denied, as it was denied a month later (R. 155).

ARGUMENT.

I. The Writ of Certiorari Is Not Justified by Any Conflict Between the Circuit Court's Decision of This Case and That of the Seventh Circuit Court of Appeals in N.L.R.B. v. E. C. Atkins and Company, 147 Fed. (2d) 730.

As its first reason for urging that the writ of certiorari be granted in this case, the Board argues that the decision here is in conflict with that reached by the Seventh Circuit Court of Appeals in the later case of *E. C. Atkins and Company*. This contention is based by the Board (Petition, p. 16) upon the fact that in the *Atkins* case the Circuit Court sustained the Atkins Company's contention that its militarized plant police were not its "employees" within the meaning of the Act; whereas, in this case, the Sixth Circuit Court of Appeals agreed with the Board that the Otis Works police were "employees," as the Company had conceded for the purposes of the case; holding, however, that the Board's duty, in the determination of the "appropriate unit" question, had not been discharged by its settlement of their employee status.

Although the two decisions are not, as respects this particular point, entirely consistent with each other, there is no such "conflict" between them as would justify the grant of certiorari at suit of the Board in this case—whatever may be said of the *Atkins* case. Were a review granted in this case, no party here could contend that the plant guards are not employees: the Company could hardly be expected to argue a point which it conceded in the Court below; and the Board could ask no relief because the Sixth Circuit Court of Appeals has agreed with its own interpretation of the term "employee." And if, in spite of that, it should ultimately be established that the decision of the point in this case was wrong, and that in the Seventh Circuit right: if, that is, military plant police are not "employees," it would justify no change in the decree of the Court below in this case, because the error was made harmless by that decree. In short, if the inconsistency is a conflict of decisions, as that phrase is used in such matters in this Court, the legal question in conflict is a moot one, so far as this case is concerned.

II. The Court Should Not Treat As an Important Question of Federal Law the Narrow Question Described in the Board's Petition for Certiorari.

As its second, and apparently its remaining, reason for urging that the writ of certiorari be granted here, the Board contends that the decree of the Court below is an erroneous decision of a question of federal law (Petition, p. 20) which has not been, but should be, decided by this Court.

As will appear in a later section of this brief, respondent believes that the ultimate question of law pre-

sented by this case is an important question, and one which should probably be settled by this Court. But it is not the question specifically described in the Board's petition.

In the Board's petition, it is proposed that this Court shall determine an extremely narrow issue: Whether a single union, which already represents other employees of an employer, may properly be certified by the Board in time of war as exclusive representative, for the purposes of collective bargaining, of plant guards who are members of the Auxiliary Military Police.

It is hard to imagine a more squeamish approach to the really important issue presented here. Apparently willing to avoid a full presentation of the issues which were really considered by the Court below, the Board intends that this Court shall hand down a decision which will cease to be of any importance to anybody when the war ends, or when the remaining forces of Auxiliary Military Police are disbanded, or when, for any other reason, the peculiar conditions of March, 1943, cease to exist. It is proposed, in other words, that the Court shall limit its consideration, not simply to plant police, but to a peculiar class of plant police at a particular time—to Auxiliary Military Police in time of war.

It is submitted that the decision of so narrow a question is not a matter of great public importance; and that the assertions of fact made in the Board's petition to support the contrary view fall short of that purpose. The list of cases contained in the Board's Appendix C shows, as is the fact, that during the past three years several of the nationally known labor unions (which had theretofore excluded industrial police from the scope of

their organizational activities) have engaged in a systematic campaign to bring this class of employees within their jurisdiction, and that the campaign has received some encouragement from the Board. But the list shows several other things as well. It shows that, in general, the Board has certified unions as representatives of industrial police in cases in which the employer—doubtlessly for sufficient reasons of his own—has raised no serious objection to the proposal; that, when serious objections have been raised, the Board has generally made no efforts to force acceptance of its certifications by employers—the three cases presented in the present petition are the only cases in which its view has been subjected to judicial scrutiny; and, finally, that the Board has seen, in the decision of the Court below in this case, no reason to change its view: the last two cases on its list, those of the *Bendix Aviation Company* and the *Rohm & Haas Company,* were decided, respectively, on January 27, 1945 and February 12, 1945, long after the Circuit Court had decided this case.[3]

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3. The Board's course my be justified by the concluding sentence of the Opinion of the Circuit Court in this case (R. 117):

> *"Confining ourselves to the facts of these particular cases,* we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied." (Italics supplied)

III. Considered Broadly, the Case Does Present an Important Question of Federal Law.

1. *Every such case requires a definition of the rules of law which must guide the Board in its establishment of "appropriate units," under Section 9 (b) of the Act.*

When it held, in this case, that the plant policemen at the Otis Works constituted an "appropriate unit" for the purposes of collective bargaining, but excluded from the "unit" the police lieutenants, captains and supervisors (R. 74-75), the Board effectively determined to extend the scope of the union's jurisdiction: to grant union representation to those employees whom it included in the "unit"; and to deny it to those who were excluded. In short, it resettled the extent to which labor unions shall control employment in the steel industry.

The power to decide such matters was granted to the Board in rather vague terms in Section 9 of the Act. Sections 9 (a) and 9 (b) read as follows:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *
>
> "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the

policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

It will be seen that in this case as in every other arising under Section 9, the Board's decision impliedly interpreted Section 9(b) to mean that, to promote the Congressional policy of the whole Act, the plant police must be placed within the union's jurisdiction.

2. *In every such case, the Board is required to decide a most important question: to draw the line between management and labor, in the manner the statute intended.*

Section 9 grants large powers, in an economic field, to the Board. It will be seen that, under these provisions of the statute, the Board might conceivably include almost anybody in any particular unit. Under Section 2 of the Act the word "employee" is given the broadest possible definition—almost anybody is an employee of any other person whose interests he serves.[4] Under the language of Section 9, the employment status of any particular "employee" is placed in the control of the majority of any "unit" in which the Board sees fit to include him; for the labor union or other representative chosen by the majority and certified by the Board has the sole power to deal with the employer concerning the wages, hours and other conditions of employment of every mem-

4. See *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111; 88 L. Ed. 1170 (1944).

ber of the "unit": no individual bargain, not approved by that union, can be lawful or valid.[5]

In this situation, it is often a matter of great importance to the individual employee that he be placed in a "unit" which will meet his peculiar needs and desires; for, once a union is chosen by the majority of his "unit," he must rely upon it to obtain for him, or to permit him to obtain for himself, satisfactory employment at satisfactory wages, and, in the end, he must often maintain the good will of the union's leaders if he is to keep his job.

But if the establishment of proper "units" is often important to the individual employee, it is, in cases of the kind presented here, of a far greater importance to the employer, for the success of management depends, in the end, upon it. This may best be seen by considering an extreme, hypothetical case, supposed by the Board in one of its leading cases[6]—the case of a supposed "unit" of *all* the employees of a large enterprise—a unit including not only the thousands of productive workers, but also the much smaller numbers of foremen, supervisors, clerks, police and others who enforce the policies laid down by executive management, and finally such ultimate managers as the corporate executives, including the president and directors. All these people are "employees," under Section 2 of the Act, and the supposed "unit" would be an "employer unit" under Section 9 (b); but it cannot be maintained seriously—and

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5. See *J. I. Case Co. v. N.L.R.B.*, 320 U.S. 332; 88 L. Ed. 489 (1944); *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678; 88 L. Ed. 749 (1944).

6. *In re Maryland Drydock Company*, 49 N.L.R.B. 733 (1943) at page 738.

the Board has never believed—that the Act intended to permit the Board to disable management by creating any such "unit," and so placing the agents of management under effective domination of the subordinates whose activities they must manage.

Instead, the Board has recognized, in the past, that its power to establish "units" is limited by the requirement of Section 9 that its decisions of all such matters must be rationally calculated to "effectuate the policies of the Act";[7] that one of those policies was to encourage the prosperity and efficiency of private industry and commerce; and that, as a result, no "unit" tending to defeat the legitimate purposes of management could be declared an "appropriate unit."

Going further to implement this view of the meaning of the Act, the Board has recognized—in the past—that the legitimate purposes of management have required the maintenance of traditional distinctions between management and labor; and has—in the past—refused to give to unions, representing labor, jurisdiction of employees who have traditionally been considered members of management.[8]

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7. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 165; 85 L. Ed. 1251, 1265 (1940).

8. See *In re Budd Wheel Co.*, 52 N.L.R.B. 666 (September 17, 1943) at pp. 668-669;

> "* * * In deciding that foremen and other supervisory employees could not constitute appropriate collective bargaining units under the Act, we did not hold that they were not employees within the definition of 'employees' in Section 2 (3) of the Act; nor did we find that it was the intent of Congress not to include them within the guarantee of collec-

3. *It has recently become an urgent matter that the Board be given legal rules to govern it in all such cases.*

From the Board's creation in 1935, until about three years ago, this view had the concurrence of the labor unions. Recently, however, having exhausted almost every field of organization amongst productive laborers, certain of the larger, industrial unions have sought to organize such classes as foremen and supervisors, licensed marine officers, plant police, and others traditionally identified with management.

It is this development of the labor movement which gives rise to the important question presented by this case. In the past, when the question first arose, the Board held that, under the Act, foremen could not be placed within the jurisdiction of the labor union which represented their subordinates—rejecting the suggestion

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tive bargaining. Rather, we found that in the absence of a clear expression of Congressional intent it was left to the administrative discretion of the Board to determine whether a specific group of employees was to be included within this guarantee. We then found that the benefits which supervisory employees would achieve through being certified as collective bargaining units 'would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees,' and that such units would 'impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act.'"

that their independence would be preserved should they be treated as a "separate bargaining unit" from that of their subordinates, as a paper-thin device which could have no real value: *In re Maryland Drydock Co.*, 49 N.L.R.B. 733 (May 11, 1943).

Later, the Board held that foremen, being management, could not have union representation, even though their union was, or was claimed to be, independent from the union which represented their subordinates:

In re Boeing Aircraft Co., 51 N.L.R.B. 67 (July 5, 1943);

In re General Motors Corp., 51 N.L.R.B. 457 (July 20, 1943).

Finally, during the current year, the Board has yielded its former view, abandoned its earlier rule, and in a widely discussed decision, held that foremen may be organized and represented by labor unions, under Section 9 of the Act: *In re Packard Motor Co.*, 60 N.L.R.B. . . .; 16 L.R.R. 168 (March 26, 1945).

A similar, and similarly confusing, history appears in the Board's decisions relating to the status of industrial police. In its earliest case relating to this class of employees, *In re R.C.A. Manufacturing Co.*, 2 N.L.R.B. 159 (1936), the Board excluded such police:

> "* * * The watchmen in the maintenance division, classified as guards by the Company and possessing a uniformed appearance, are a group obviously separate from the regular production employees. None of the above for the reasons stated should be included in the same bargaining unit with the production employees."

In case after case, the same principle was applied:

Burnside Steel Foundry, 7 N.L.R.B. 714 (June 17, 1938);

Southport Petroleum Co., 8 N.L.R.B. 792 (August 4, 1938);

Elliott Bay Lumber Co., 9 N.L.R.B. 3 (October 1, 1938);

Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200, 204 (October 14, 1939);

Inland Steel Co., 9 N.L.R.B. 783, 790 (November 12, 1938);

Southern California Gas Company, 10 N.L.R.B. 1123 (January 14, 1939);

F. E. Booth Co., 10 N.L.R.B. 1491 (January 30, 1939);

Automotive Maintenance Co., 13 N.L.R.B. 338 (June 21, 1939);

Armour & Co., 13 N.L.R.B. 1143 (July 25, 1939);

American Machine & Foundry Co., 14 N.L.R.B. 497 (August 14, 1939);

Magnolia Petroleum Co., 18 N.L.R.B. 380 (December 16, 1939);

Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (December 18, 1939);

Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (December 29, 1939);

Armour & Co., 26 N.L.R.B. 1046 (August 23, 1940).

Then, in a case in which nobody objected to the plan, the Board included in an "appropriate unit" of productive employees eight watchmen employed in an electrical goods factory in Lima, Ohio:

In re Westinghouse Electric & Mfg. Co., 28 N.L.R.B. 799 (December 23, 1940).

Three months later, the same union was (by application of *stare decisis* it seems) given jurisdiction of the guard force at another, much larger plant, against the employer's objections:

In re R.C.A. Manufacturing Co., 30 N.L.R.B. 668 (March 29, 1941).

And later in the same year, the United Automobile Workers Union (C.I.O.) commenced the campaign mentioned above, by attempting to obtain jurisdiction of plant police throughout the automobile industry: see *In re Chrysler Corporation*, 44 N.L.R.B. 881 (October 7, 1942). Other unions soon followed its example, and within a very short time the Board had published the decisions appearing in the long list at the end of its petition here.

Most of the decisions identified on the Board's list are mere election orders, none of which can be reviewed by the Courts under the Act, and many of which have never become effective. They reflect a confusing change in one of the Board's principles, more than they do any real change in real labor relations. But if (as the Board says) these cases reflect also the need for a clarification of its powers and duties under Section 9 of the Act, it is not because the status of militarized plant guards, in time of war only, should be settled here. It is because the Board has been unable to define the nature and limits of its duty to segregate management from labor, even to its own satisfaction, not only in police cases, but also in cases involving foremen and other supervisory agents of every class; and because a settlement of that question is desirable throughout industry.

IV. The Decision of This Case by the Court Below Was Sound and Correct.

In its disposition of this case, the Court below simply applied to the new situation presented here the established principles which must be applied by the Board in all such cases as this, if the limits of its discretion here are those fixed by this Court in decisions relating to other sections of the Act. Thus, the Court below held:

1. That the powers of the Board in the establishment of "appropriate units" under Section 9 of the Act are limited, *inter alia*, by a rule of law that every such unit must be rationally calculated to effectuate the policies of the Act: *Pittsburgh Plate Glass Co. v. N.L.R.B., supra.*

2. That no order made by the Board, under this or any other section of the Act, can be held valid unless it meets two tests: it must effectuate the policies of the Act; and it must do so without at the same time offending or infringing any other equally important statute, law or principle of public policy: *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31; 86 L. Ed. 1246 (1942); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177; 85 L. Ed. 1281 (1941); *N.L.R.B. v. Delaware-New Jersey Co.*, 128 Fed. (2d) 130 (3 C.C.A., 1942).

3. That the effectiveness of management—or of police authority—is, manifestly and necessarily, prejudiced, if the loyalty and fidelity of the manager (or the policeman) is divided between his employer and his labor union, as it must be when he is obliged to enforce the employer's rules and policies against brother members of the union: *In re Maryland Drydock Co.*, 49 N.L.

R.B. 733 (1943); *In re Budd Wheel Co.*, 52 N.L.R.B. 666 (1943); *N.L.R.B. v. Delaware-New Jersey Ferry Co.*, 128 Fed. (2d) 130 (3 C.C.A., 1942).

4. That, in time of war, the effective management of steel plants is a matter of great public importance; and that the consequent public necessity that steel plants shall have effective guards is shown by the establishment of the force of Auxiliary Military Police.

5. That, as a result, such an order as that involved here is invalid because it tends to defeat the public need for the completest effectiveness and independence of the plant guards involved in this case.

There is, in the foregoing analysis of the matter, nothing which offends any principle of law upon which the Board has any right to rely. The Circuit Court has simply given the Act a reasonable interpretation; and has given the Board, it is submitted, all the scope which Congress intended it should have, by requiring it to draw the line between labor and management at a point which will preserve the proper and desirable functions of the latter.

V. The Case Presents the Same Question as That Presented by the Petition for Certiorari in Jones & Laughlin Steel Corporation v. National Labor Relations Board at No. 1294 October Term, 1944.

In the petition for certiorari in *Jones & Laughlin Steel Corporation v. N.L.R.B.*, now pending here at No. 1294 of the present term, the essential question sought to be presented for review is precisely that which has been discussed. In that case, the National Labor Relations Board granted the petition of a labor union to be

certified as representative of the federally licensed masters of a fleet of registered steam vessels employed in navigation on the Mississippi and Ohio rivers. The employer, the owner of the vessels, was willing to recognize the union, and two other unions which had associated with it, as representatives of all subordinate members of the crews of the vessels, including such supervisory employees as the licensed mates, pilots and marine engineers. However, it opposed inclusion of the masters in the Board's "unit," contending that, to preserve its right of management of the vessels (a matter of great importance under federal laws), particularly during long voyages, it must be assured the undivided loyalty and independence of the master of each vessel. For the soundness of this position under the Act, it found support in the traditions of the maritime calling before 1935; in certain of the earlier decisions of the Board;[9] and in the principles and the decisions[10] relied upon by the Court below in this present case. The Fifth Circuit Court, nevertheless, upheld and enforced an order by which the Board had rejected the employer's contentions, as unjustified by the Act, and had commanded inclusion of the masters within the union's jurisdiction—

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9. *In re United States Lines,* 28 N.L.R.B. 896 (1941); *In re Detroit & Cleveland Navigation Co.,* 29 N.L.R.B. 176 (1941); *In re United Dredging Co.,* 30 N.L.R.B. 739 (1941).

10. Among them, *N.L.R.B. v. Delaware-New Jersey Ferry Co.,* 128 Fed. (2d) 130 (1942) a case cited in the opinion of the Court below and in earlier sections of this brief, in which the Third Circuit Court of Appeals denied the Board the power, under Section 9 of the Act, to require recognition of a labor union as representative of licensed marine officers.

Jones & Laughlin Steel Corporation v. N.L.R.B., 146 Fed. (2d) 833 (5 C.C.A. 1945).

A comparison of the records in the two cases—in this case and the case of the licensed shipmasters—will show that the decisions are in conflict, and that the same rules of law should govern the decisions in both. The efficiency of the merchant marine is as essential to the public good, in time of war, as is the efficiency of the steel industry; the fidelity of the licensed shipmaster is as essential to proper management in the merchant marine as is that of the industrial policeman to proper management in the steel industry; and unionization should have approximately the same effect upon shipmasters, in their dealings with subordinates controlled by the same union, as it has upon industrial police.

In short, if a review by this Court is justified in this case, on the ground that the question presented here is of general importance, the shipmasters' case should be reviewed also. A proper interpretation of Section 9 of the Act must apply as well to one kind of case as to another; and such an interpretation can be settled more reliably if both cases be considered, than if either one be dealt with by itself. The alternative possibility, suggested by the language of the Board's petition, that this Court shall now settle the status of Auxiliary Military Police in time of war; that it shall later settle the status of industrial police when the country is not at war; and that, from time to time and in case after case, it shall advise the Board how to treat each of tens or possibly hundreds of similarly restricted classes of employees, has much less to recommend it, in general principles.

Conclusion.

As the foregoing is intended to show, respondent believes and contends that:

1. The decision of the question of law, described in the Board's petition for certiorari as that which the Board intends to present for review in this case, could have no general or lasting importance; and therefore no writ of certiorari should be granted simply to make possible consideration here of that narrow question.

2. However, if the case be considered as one in which this Court may properly be called upon to interpret Section 9 (b) of the National Labor Relations Act, and to define the rules of law which must govern the Board in decisions establishing "appropriate units" in such cases as this, it does present a question of federal law of the most general and lasting importance, which has not been but which should be decided by this Court.

3. Should the writ of certiorari be granted, to make possible the consideration by this Court of the meaning of Section 9 (b) of the Act, the writ should also be granted in the case of *Jones & Laughlin Steel Corporation v. N.L.R.B.*, now pending at No. 1294 October Term, 1944, in which the same question is presented in slightly different terms.

Respectfully submitted,

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